SUPREME COURT, U. S.

No. 74-1484

FILED

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974

FRANK QUINTANA,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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The respondent, State of New Mexico, respectfully prays that a writ of certiorari not issue to review the judgment of the Court of Appeals of the State of New Mexico entered on April 2, 1975.

OPINION BELOW

Respondent adopts the statement of the petitioner of the opinion below.

JURISDICTION

Respondent acknowledges that this Court has jurisdiction.

STATEMENT OF THE CASE

Respondent adopts the petitioner's statement of the case, and adds thereto the following facts, quoted from the opinion of the Court of Appeals of the State of New Mexico.

> "On December 7, 1972, several law enforcement officers, both city and state, went to the headquarters of the El Vicio Methadone Maintenance Program at 331 Garfield Street in Santa Fe for the purpose of executing a search warrant. The officers arrived in an unmarked car at approximately 6:30 a.m., drove around the block to observe any activity on the premises or in the neighborhood and then returned to the front of the building, parked and waited. At about 6:45 a.m., defendant arrived, parked his car, and entered the building. When the officers saw the defendant approach the building they got out of their vehicle and walked toward him. Their testimony indicates that they intended to reach him before he went into the building. There is no evidence that defendant either saw or was aware of the presence of these officers; and upon entering the building, he locked the door behind him. State Police Officer Ortiz, who was in charge of the search party, reached the two steps leading to the door just as the defendant was locking it; and when he knocked, the defendant turned and looked at him through a small window in the door. The officer identified himself and told defendant that he had a warrant to search the premises. Defendant responded through the door that he did not want to open the door. He then turned and walked very rapidly to the opposite side of the entry room.
>
> "The room was rectangular in shape measuring approximately 18 x 20 feet. Through the window in the door, Officer Ortiz observed the defendant squat down in front

of a gas heater, put his right hand in his right coat pocket and remove 'what appeared to be aluminum foil.' He next saw the defendant place his left hand in the other coat pocket and then throw whatever he had in both hands under the heater. At that moment the officers forced the door open and entered the building. Officer Ortiz went directly to where the defendant was squatting and reiterated his identity and purpose. Officer Ortiz then searched under the heater and retrieved two large aluminum foil packets. An examination of the packets disclosed that one contained three smaller packets, each of which contained approximately one gram of heroin. The other packet contained 30 smaller packets of heroin.

"The biochemist's analysis of random samples taken from the contents of all the packets demonstrates that they contained heroin. There is no evidence as to the total weight nor as to the purity of the heroin confiscated."

REASONS FOR DENYING THE WRIT

The petitioner, alleging a violation of the Fourth Amendment and relying on the dictates of *Marron v. United States,* 275 U.S. 192 (1927) claims that the search warrant in the instant case was defective in that it was a general warrant. The respondent, State of New Mexico, contends that the claims of the petitioner are without merit, the search warrant being not a general warrant and further, that any such question is obviated by the fact that the affidavit for the warrant was attached to the search warrant and was specifically incorporated therein by reference (Tr. 714). Further, the search warrant refers to the contraband being sought by its generic name, it being under the circumstances the only reasonable manner in which to describe the many narcotic substances being sought by the police.

The affidavit reiterated extensive specific, as well as general incidents involving dealings in drugs at the El Vicio center and

by people connected with it. These drugs were referred to in the affidavit as "controlled substances" as well as "heroin." Controlled substances to a police officer are specific, abet, if not more specific than "narcotics and dangerous drugs" approved in *Weber v. Superior Court for County of Santa Clara*, 30 C.A. 3d 810, 106 Cal. Rptr. 593 (Cal. App. 1973). The officer was left with no discretion whatsoever in the instant case. "Controlled substances" are enumerated in detail in the statutes. 54-11-1, *et seq.*, N.M.S.A., 1953 Comp. (Repl. Vol. 8, Pt. 2, 1973). The words "kept there contrary to law" are also material here. Uniquely – and properly – the return to the warrant notes that none of the quantity of methadone maintained legally in the facility's medical cabinet was seized – only various packets and containers of heroin, "cookers" and "two needles tied with a shoe string."

It must be remembered that there is a vast difference between the First Amendment right to access and the potential defendant's Fourth Amendment immunity from unreasonable search and seizure such as was alluded to in *Stanford v. Texas*, 379 U.S. 476 (1965). In *Stanford v. Texas, supra*, Mr. Justice Stewart stated:

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, then the basis for their seizure is the ideas which they contain. And further, 'the point is that it was not any contraband of that kind which was ordered to be seized, but literary material "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the communist party of Texas. . ." ' " 379 U.S. at 486.

Absent a First Amendment issue as existing in *Stanford v. Texas, supra*, the strict particularity test need not be met.

United States v. Scharfman, 448 F.2d 1352 (2nd Cir. 1971); *United States v. Womack*, 509 F.2d 368 (D.C. Cir. 1972).

As noted in *Marron v. United States, supra*, the touchstone of the Fourth Amendment right is that nothing is left to the discretion of the officer executing the warrant (275 U.S. at 196). Here, the officers had no impermissible discretion.

It is axiomatic that the degree of specificity required when describing the goods to be seized varies according to the circumstances and the type of items sought. *Spinelli v. United States*, 282 F.2d 871 (8th Cir. 1967), reversed on other grounds (393 U.S. 410 (1969)). The general rule is that only those items described in the search warrant may be seized though there are numerous exceptions to that rule such as those in *United States v. Zeidman*, 444 F.2d 1051 (7th Cir. 1971), *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967); *United States v. Kane*, 450 F.2d 77 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); *United States v. Mahler*, 442 F.2d 1171 (9th Cir. 1970), *cert. denied*, 404 U.S. 993 (1971), concerning the seizing of evidence that has a nexus with the crime under investigation. Further, in the instant case the search warrant expressly incorporated the affidavit in specifying the items to be seized, which obviates any defect under *Marron, supra. Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971).

The search warrant specifies "controlled substance which may be kept there contrary to law." Such a description clearly can only describe the generic class of items the officers were seeking, in particular when an exact description is generally impossible as it was in the instant case. *James v. United States*, 416 F.2d 467 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970).

CONCLUSION

For the aforestated reasons, a writ of certiorari should not issue.

Respectfully submitted,

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